

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 DAVID AUGUST KILLE SR.,

4 Plaintiff

5 v.

6 ED GRAY et al.,

7 Defendants

Case No. 2:19-cv-00988-GMN-BNW

ORDER REMANDING CASE
BACK TO STATE COURT

8
9 Plaintiff, a former inmate of the Nevada Department of Corrections (“NDOC”), filed
10 a civil rights complaint pursuant to 42 U.S.C. § 1983 in state court, which Defendants
11 removed. (ECF Nos. 1, 1-2). After removal, Plaintiff filed two motions to remand (ECF
12 Nos. 5, 6), a motion for sanctions (ECF No. 7), and a motion to extend copy work (ECF
13 No. 13). The Court grants the motions to remand, denies the motion for sanctions, and
14 denies as moot the motion to extend copy work limit.

15 **I. MOTIONS TO REMAND**

16 In this case, Plaintiff sued 25 defendants. (ECF No. 1-2 at 4). On June 11, 2019,
17 the Office of the Attorney General filed a notice of removal stating that it represented
18 Defendants Ed Gray, Michael Keeler, Tony Corda, Susan Jackson, Adam Endel, Eric
19 Christiansen, the NDOC, Brian Williams, James Dzurenda, Nevada Board of Prison
20 Commissioners, Brian Sandoval, Steve Sisolak, Adam Laxalt, Aaron Ford, Barbara
21 Cegavske, and the State of Nevada and that all of these defendants had consented to
22 removal of the action. (ECF No. 1 at 1, 3). The Office of the Attorney General stated that
23 it was “unaware of any defendant that was properly served before the notice of removal
24 was filed but did not formally join in the notice of removal.” (ECF No. 4 at 2).

25 On June 28, 2019, Plaintiff filed his first motion to remand. (ECF No. 5). In the
26 motion, Plaintiff states that he served 18 of the 25 defendants through the Carson City
27 Sheriff’s Office. (ECF No. 5 at 2-5). Plaintiff lists the dates and time of service for each
28 of those 18 defendants. (*Id.*) Plaintiff states that the Carson City Sheriff’s Office was

1 unable to serve Defendants Susan Jackson, Adam Endel, Ed Gray, Michael Keeler, Tony
2 Corda, Eric Christiansen, and Lucille Monterde. (*Id.* at 4-5). Plaintiff asserts that the
3 Office of the Attorney General “lied” and committed “fraud” when it said it represented six
4 of these unserved defendants. (*Id.* at 5-6). Additionally, Plaintiff states that the Attorney
5 General’s Office failed to present formal written requests that it had the authority to
6 represent Defendants Brian Williams, James Dzurenda, Brian Sandoval, Steve Sisolak,
7 Adam Laxalt, Aaron Ford, and Barbara Cegavske. (*Id.* at 6). Plaintiff argues that, of the
8 18 defendants that were served, the Office of the Attorney General only seeks removal
9 for 10 of the served defendants. (*Id.* at 7). Plaintiff argues that removal was not
10 unanimous and must be remanded under the statute. (*Id.*) Additionally, Plaintiff asserts
11 that the moving defendants were not reasonably diligent in determining whether or not
12 any of the other named defendants had been served. (*Id.* at 8).

13 Plaintiff’s second motion for remand reiterates that he has not been able to serve
14 Defendants Susan Jackson, Adam Endel, Ed Gray, Michael Keeler, Tony Corda, and Eric
15 Christiansen despite the Office of the Attorney General’s assertion that it represents those
16 defendants. (ECF No. 6 at 2-3). Jakob Dzyak of the Carson City Sheriff’s Office notified
17 Plaintiff that, on June 27, 2019, he tried to re-serve the seven remaining defendants at
18 the Office of the Attorney General but the Office of the Attorney General refused to accept
19 service for those defendants. (*Id.* at 2-3).

20 In its response, filed on July 11, 2019, the Office of the Attorney General states
21 that it also represented Defendants Nevada Department of Public Safety, the Division of
22 Parole and Probation, the Nevada Parole Board, Natalie Wood, Stephanie O’Rourke,
23 Tom Lawson, and Lamicia Bailey. (ECF No. 9 at 1). The Office of the Attorney General
24 argues that all served Defendants consented to removal and that there was no
25 requirement to attach or provide client requests for representation. (*Id.* at 1-2).
26 Additionally, the Office of the Attorney General asserts that Plaintiff did not attach proof
27 of service to demonstrate that Plaintiff properly served James Wright. (*Id.* at 2). The
28 Office of the Attorney General states that, at the time of removal, Plaintiff had not

1 completed proper service on all named defendants. (*Id.*) The Office of the Attorney
2 General states that it has the authority to represent the defendants listed as its clients.
3 (*Id.* at 3). The Office of the Attorney General represents all defendants except James
4 Wright and Lucille Monterde and notes that Plaintiff concedes that he did not serve
5 Monterde. (*Id.*) With respect to James Wright, the Office of the Attorney General states
6 that Wright is a former state employee and, thus, “[a]ssuming Plaintiff attempted to serve
7 James Wright at his former employment, this was improper.” (*Id.* at 4). The Office of the
8 Attorney General states that Plaintiff has not submitted proof that he properly served
9 Wright and, thus, fails to demonstrate that removal was not unanimous. (*Id.*) The Office
10 of the Attorney General states that it is not authorized to accept service for former
11 employees and cites NRS § 41.039. (*Id.*)

12 In reply, Plaintiff asserts that, prior to removal, he filed a motion for extension of
13 copy work in state court and, thus, the Office of the Attorney General knew that Plaintiff
14 could not make copies of his service documents because he has no funds. (ECF No. 12
15 at 2). Plaintiff requests an extension of copy work limit if the Court would like Plaintiff to
16 provide copies of his service documents. (*Id.* at 3). Plaintiff also notes that the Office of
17 the Attorney General accepted service and represents three former state employees
18 including Brian Sandoval, Adam Laxalt, and James Cox but for some reason refuses to
19 accept service for Lucille Monterde in violation of the Nevada Rules of Civil Procedure
20 4.2(d)(2)(A). (*Id.* at 3-4). Plaintiff reiterates that Jakob Dzyak of the Carson City Sheriff’s
21 Office served Wright on May 3, 2019 at 10:10 a.m. and service was accepted by
22 Executive Assistant Linda Herron. (*Id.* at 4). Plaintiff also notes that the Office of the
23 Attorney General repeatedly cites the wrong statute regarding the need for written
24 representation and correctly notes that the Office should be citing NRS § 41.0339. (*Id.* at
25 6).

26 **A. Legal Standard**

27 A defendant may remove an action to federal court if the plaintiff could have initially
28 filed the complaint in federal court. 28 U.S.C. § 1441(a). In order to remove, “all

1 defendants who have been properly joined and served must join in or consent to the
2 removal of the action.” 28 U.S.C. § 1446(b)(2)(A). However, a named defendant that a
3 plaintiff has not served need not join in a notice of removal. *Salveson v. W. States*
4 *Bankcard Ass'ns*, 731 F.2d 1423, 1429 (9th Cir. 1984), superseded by statute on other
5 grounds as recognized in *Ethridge v. Harbor House Rest.*, 861 F.2d 1389 (9th Cir. 1988).

6 “Where fewer than all the defendants have joined in a removal action, the removing
7 party has the burden under section 1446(a) to explain affirmatively the absence of any
8 co-defendants in the notice for removal.” *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d
9 1261, 1266 (9th Cir. 1999), superseded by statute on other grounds as explained in
10 *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006). “The failure
11 to join all proper defendants in a removal petition may otherwise render the removal
12 petition procedurally defective.” *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1193 n.1
13 (9th Cir. 1988).

14 A motion to remand is the proper procedure for challenging removal. 28 U.S.C. §
15 1447(c). A district court must construe the removal statutes strictly against removal and
16 resolve any uncertainty in favor of remanding the case to the state court. *Gaus v. Miles,*
17 *Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (“[f]ederal jurisdiction must be rejected if there is
18 any doubt as to the right of removal in the first instance”). “The ‘strong presumption’
19 against removal jurisdiction means that the defendant always has the burden of
20 establishing that removal is proper.” *Id.* Courts should resolve doubts as to removability
21 in favor of remanding the case to State court. *Id.*

22 **B. Discussion**

23 The Court grants Plaintiff’s motions to remand this case back to state court. The
24 Court finds that the Office of the Attorney General’s petition for removal was procedurally
25 defective because not all purportedly, properly served defendants have consented to
26 removal. Although Plaintiff’s argument focuses on the Office of the Attorney General’s
27 ability to represent six defendants that he has been unable to serve, the Court takes issue
28 with the “rule of unanimity” and Defendant James Wright.

1 In an attempt to explain why the other defendants have not joined in the removal,
2 the Office of the Attorney General states, "To undersigned counsel's knowledge, all
3 served defendants have joined in removal. However, service has not been completed for
4 all named defendants." (ECF No. 1 at 3). In the motion to remand, Plaintiff explicitly
5 states that the Carson City Sheriff's Office served James Wright on May 3, 2019 at 10:10
6 a.m. (ECF No. 5 at 3). In Plaintiff's reply, he states that Executive Assistant Linda Herron
7 accepted service for James Wright. (ECF No. 12 at 4).

8 Despite the removing parties' burden to establish that removal is proper and to
9 affirmatively explain the absence of any co-defendants in the notice for removal, the
10 Office of the Attorney General repeatedly states that Plaintiff has presented no proof that
11 he properly served James Wright. (ECF No. 9 at 2, 4). Conversely, the Office of the
12 Attorney General has not presented any proof that Plaintiff improperly served James
13 Wright. Plaintiff does not have to prove that he properly served James Wright. It is the
14 removing parties' burden to establish that removal was proper.

15 Moreover, the Office of the Attorney General asserts that Plaintiff bears the burden
16 of establishing proper service but then provides an incorrect case law citation to a
17 purported Ninth Circuit case that is actually a Sixth Circuit case with a different name.¹
18 (ECF No. 9 at 4). The Office of the Attorney General also states that it is not authorized
19 to accept service for former employees and then incorrectly cites to NRS § 41.039, which
20 does not stand for that proposition. (*Id.*)

21 Additionally, the Office of the Attorney General is incorrect in stating that it is not
22 authorized to accept service for former employees. The Nevada Rules of Civil Procedure,
23 which discusses service of former state employees, explicitly states:

24 Any current or former public officer or employee of the State who is sued in his or
25 her official capacity or his or her individual capacity for an act or omission relating
26 to his or her public duties or employment must be served by delivering a copy of

27 ¹ The Office of the Attorney General cites incorrectly to the following case:
28 *Butcher's Union Local 498, United Food and Commercial Workers v. SDC Inv., Inc.*, 788
F.3d 535, 538 (9th Cir. 1986). (ECF No. 9 at 4). The case citation is to a Sixth Circuit
case by another name and does not stand for the proposition asserted.

1 the summons and complaint to:

2 (A) the Attorney General, or a person designated by the Attorney General to
3 receive service of process, at the Office of the Attorney General in Carson City;
4 and

5 (B) the current or former public officer or employee, or an agent designated by him
6 or her to receive service of process.

7 Nev. R. Civ. P. 4.2(d)(2) (emphasis added).

8 The Nevada Rules of Civil Procedure and the Nevada Revised Statutes
9 differentiate between service and representation. As for representation, NRS § 41.0339
10 states that “[w]ithin 15 days after service of a copy of the summons and complaint or other
11 legal document commencing the action,” a former state employee must submit a written
12 request for “defense” to the “official attorney” NRS § 41.0339(1)(a)(1). This statute
13 recognizes that service is different from representation.

14 Overall, the Court grants Plaintiff’s motions to remand this case to state court. The
15 Office of the Attorney General has not met its burden of establishing that removal was
16 proper. The Office of the Attorney General has not established that James Wright was
17 improperly served. As such, the removal is procedurally defective because all defendants
18 who purportedly have been properly joined and served have not consented to the removal
19 of the action.

20 **II. MOTION FOR SANCTIONS**

21 Plaintiff seeks sanctions against the Office of the Attorney General due to “fraud”
22 as described in the motion to remand. (ECF No. 7 at 3). The Court denies the motions
23 for sanctions but notes that Plaintiff has successfully pointed out several errors made in
24 this case by the Office of the Attorney General.

25 ///

26 ///

27 ///

28 ///

 ///

 ///

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2
3

4

5
6

7

9

11